

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2008

MICHAEL JAMES GRUBB v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Sullivan County
No. S53, 484 Robert H. Montgomery, Jr., Judge

No. E2008-00536-CCA-R3-PC - Filed October 23, 2008

The petitioner, Michael James Grubb, was convicted of aggravated robbery, a Class B felony, and sentenced to twelve years incarceration. The petitioner appealed his sentence, but his conviction was affirmed on direct appeal. *See State v. Michael James Grubb*, No. E2005-01555-CCA-R3-CD, 2006 WL 1005136 (Tenn. Crim. App. at Knoxville, April 18, 2006). The petitioner now appeals the post-conviction court's denial of his petition for post-conviction relief and argues that he received the ineffective assistance of counsel. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Jerry J. Fabus, Jr., Gray, Tennessee, for the appellant, Michael James Grubb.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and William Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The facts of this case as summarized on direct appeal, are as follows:

The conviction and sentence at issue in this appeal stems from the May 11, 2003 armed robbery of a health food store in Bristol, Tennessee. The Defendant, Michael James Grubb, was the get-away driver for a two-man team that first cased and then robbed the small business and fled across the state line to Bristol, Virginia, where the Defendant was eventually arrested. In October of 2003, a Sullivan County grand jury indicted the Defendant on one count of aggravated robbery. *See* Tenn. Code Ann. § 39-13-402.

The evidence in the record before us shows that on the afternoon of May 11, 2003, Ms. Jennifer Leagan, the owner of Bristol Health Food Store, and an employee, Ms. Clennie Bowers, were working in the store. According to Ms. Leagan, “a man came in the store with a ski mask on, a gun in his hand and coming towards us said ‘I want your money now.’” Ms. Leagan took out the cash register drawer and turned it over to the robber. The robber demanded that Ms. Bowers go to the back of the store, and she complied. While in the back, Ms. Bowers dialed 911 and reported the robbery. The robber left with \$259.

Ms. Leagan testified that the man who robbed her was black, “six feet or five feet eleven inches,” and had a “medium build.” The robber was wearing a dark colored T-shirt, brown gloves and a black ski-mask. The gun used was described as black and not a revolver but the kind “with a clip.” Several days after the robbery, Ms. Leagan was watching T.V. when she saw a news report of a white man that had been apprehended as a suspect in a recent robbery. Ms. Leagan recognized the man, which turned out to be the Defendant, and phoned the police to inform them that this man had been in her store about two hours before the robbery. She remembered him because of a T-shirt he was wearing which stated “real men don’t need directions.”

At approximately the same time the robber was fleeing the scene, Ms. Clennie Bowers’ daughter, Ms. Heather Bowers, drove into the health store parking lot. Ms. Heather Bowers testified that as she entered the parking lot, she observed a car leaving in which the passenger, a black male, was leaned over on top of the driver, a white male. She further stated that she saw the two men leave in a Chevrolet Celebrity “between ‘84 and ‘86, gray.” At the motion to suppress, Ms. Heather Bowers described the driver as having gray, shoulder-length hair. At the trial, she admitted she was not sure of the hair, and stated that her initial report to the police regarding the driver of the car was simply that he was a white male.

Officers Craig Beyer and James Almany of the Bristol, Tennessee Police Department received an “official bulletin from our central dispatch that there had been an armed robbery.” Officer Almany testified that the “suspect vehicle was blue or gray in color, Chevy Celebrity, with a white male and a black male.” Officer Beyer testified that he was looking for a gray Chevrolet Celebrity with a white male driver and a black male passenger, and shortly thereafter observed and began to follow a “faded blue Celebrity.” As Officer Beyer followed the vehicle, he radioed central dispatch to run the tag number. Before the results came back, the suspect had driven across the state line into Virginia, and the Bristol, Virginia Police Department was contacted. Officer Almany joined Officer Beyer, and both officers followed the suspect vehicle into Virginia.

Both Officer Beyer and Officer Almany testified that when they first began to follow the suspect vehicle, only one occupant, a white male driver, could be seen. However, at some point both officers observed a black male rise from the passenger seat of the vehicle. Officer Almany testified that it was at this point, and not prior, that the officers activated their blue lights. Both officers testified that at one point in the pursuit, the Defendant's car slowed, the passenger exited and ran off, and the Defendant then drove on. Officer Beyer continued to follow the Defendant, who was eventually stopped by Bristol, Virginia police. Officer Beyer testified that the car he had pursued was registered to the Defendant. Officer Almany broke off his pursuit of the Defendant in an attempt to apprehend the suspect who fled on foot. Officer Almany, who had a K-9 unit with him, gave a warning and then released the police dog. This suspect, a black male who had been riding as a passenger in the car, was not apprehended.

Officer Steve Crawford of the Bristol, Virginia Police Department was notified the day of the robbery that Bristol, Tennessee Police were in pursuit of a vehicle that had crossed into Virginia. Officer Crawford soon observed the Chevrolet pursued by what he recognized as an unmarked Bristol, Tennessee Police Department vehicle. Officer Crawford joined the pursuit and witnessed the Defendant run two stop signs and speed through a residential area. The Defendant was subsequently stopped by the Bristol, Virginia Police. The Defendant was arrested for felony eluding police but was later turned over to Tennessee law enforcement officers. Officer Crawford identified the Defendant as the driver of the car he pursued, and described the Defendant's car as "faded gray." He also noted that he saw a shopping bag on the front seat of the Defendant's car.

Detective Johnny Hale of the Bristol, Tennessee Police Department testified that he inventoried the Defendant's vehicle after it was towed back to Tennessee and recovered a black semi-automatic style pistol and a pair of brown gloves, which were found in a white plastic bag on the front seat. The handgun turned out to be a BB or pellet gun. A black ski-mask was recovered from under the front seat. As to the color of the vehicle, Det. Hale stated it "depends on what area of the car you look at. Potentially blue, but it has what would appear to be gray," and on another occasion he further testified that the car appeared either gray or blue depending on the angle at which it was viewed.

Detective Hale also testified that when he first met with the Defendant, the Defendant was advised of his rights, elected to sign a waiver, and agreed to talk with the detective. The Defendant initially claimed he did not know anything about the robbery, never had a black male in his car that day, and had not loaned his car to anyone else in the past ten days. The Defendant stated he did not know how the items recovered from his vehicle had made their way into his car. Detective Hale

also noted when the Defendant was arrested and interviewed he was wearing a T-shirt upon which was printed “Real men don’t ask for instructions.”

The Defendant filed a motion to suppress the evidence recovered from his vehicle in March of 2004. Over the course of two days in December 2004, an evidentiary hearing was conducted on the Defendant’s motion, at the conclusion of which the trial court denied the motion to suppress. Several days later the Defendant received a jury trial and was ultimately found guilty of aggravated robbery. After a sentencing hearing, the Defendant was sentenced as a Range I, standard offender to twelve years in the Department of Correction. . . .

Grubb, No. E2005-01555-CCA-R3-CD, 2006 WL 1005136, at *1 (internal citations omitted). On March 29, 2007, the defendant filed a pro se petition for post-conviction relief. Counsel was appointed and an amended petition was filed. An evidentiary hearing was held on October 31, 2007.

The petitioner testified at the evidentiary hearing that his trial counsel was ineffective for several reasons. First, the petitioner alleged that trial counsel was ineffective for failing to exclude the preliminary hearing testimony of deceased Police Officer Craig Beyer because he was not available within the meaning of Tennessee Rule of Evidence 804. According to the petitioner, counsel should have argued that Officer Beyer’s testimony should have been excluded because Officer Beyer made himself unavailable by committing suicide. The petitioner recalled that he discussed Officer Beyer’s suicide with counsel, but counsel did not want to raise Officer Beyer’s suicide as an issue. However, the petitioner admitted that counsel elicited testimony at trial to show that Officer Beyer had committed suicide.

Second, the petitioner asserted that trial counsel failed to question witnesses about physical evidence the petitioner believed had been planted in his car by police officers. The petitioner accused police officers of planting a pistol that was found upside down in the passenger seat of his car with the clip-end of the gun pointing straight up. According to the petitioner, there was no way that the other suspect could sit in the passenger seat while the gun was wedged in the seat with the handle pointing up. Next, the petitioner complained that trial counsel failed to counter police officers’ assertions that the suspect in the car with the petitioner jumped from the car and ran down an alley behind Buckner street. The petitioner alleged that his own brother investigated and determined that there was no alley behind Buckner street. The petitioner said that trial counsel failed to investigate or raise this issue at trial. Additionally, the petitioner alleged that counsel was ineffective because he met with him only twice before his trial.

In addition, the petitioner complained that prior to trial counsel failed to provide him with a copy of the surveillance videotape taken from the pursuing police cruiser. According to the petitioner, counsel informed him that he had reviewed the videotape and it did not show the other suspect in the petitioner’s car, or show that suspect exit the petitioner’s car at any point. The petitioner stated that the first time he saw the videotape was at trial. The petitioner also alleged that counsel failed to address why the petitioner had been in the store on the day of the robbery. The

petitioner claimed that he wanted to see if the store carried a product made by his ex-wife's boyfriend. The petitioner claimed his ex-wife would vouch for this fact. The petitioner further complained that counsel failed to object to the testimony of Officers Crawford and Booher, two Police Officers who were not listed in the indictment but who subsequently testified at trial. Finally, the petitioner asserted that trial counsel should have shown that the petitioner would have used a different route to drive from Sullivan County, Tennessee to Bristol, Virginia if he was attempting to flee the scene of a crime.

On cross-examination, the petitioner admitted that trial counsel raised the issue of Officer Beyer's suicide at trial. The petitioner also admitted that he did not have any information which connected Officer Beyer's suicide to his case in any way. The petitioner maintained his assertion that the evidence recovered from his car was planted despite the fact that police officers never lost contact with the petitioner's car and no one else had access to it. The petitioner also admitted that the surveillance videotape from the patrol car showed the camera stop at the approximate point where officers stopped their cars to chase the suspect who exited the petitioner's car. After complaining that counsel should have addressed petitioner's reason for visiting the store on the day of the robbery, the petitioner acknowledged that he elected not to testify and there were no other witnesses who could verify that he went to the store to find the product made by his ex-wife's boyfriend.

The petitioner's trial counsel testified at the evidentiary hearing that he had practiced law in Sullivan County, Tennessee since October of 1979 and had tried several criminal jury trials before he was appointed to represent the petitioner. Counsel stated that the petitioner told him he had been waiting to proceed on his case for some time and wanted a trial as quickly as possible. Counsel agreed to pursue a Motion to Suppress Officer Beyer's statement on petitioner's behalf.

Counsel testified that he discussed Officer Beyer's suicide with the petitioner. Counsel stated that he understood petitioner's concern that Officer Beyer's preliminary hearing testimony would be read into the record at trial without an opportunity for cross-examination. Counsel stated that he objected to the entry of Officer Beyer's preliminary hearing testimony at trial. Counsel also stated that he investigated the circumstances of Officer Beyer's suicide and found that Beyer's suicide was not related in any way to the petitioner's case. Counsel stated that contrary to the petitioner's assertion, he was able to procure a copy of the surveillance videotape and review it with the petitioner prior to trial. Counsel acknowledged that the surveillance videotape contained a discrepancy between the timing listed on the videotape and the timing of the actual arrest. Counsel recalled that he cross-examined Officer Almany during trial about the discrepancy. Counsel also recounted that Officers Booher and Crawford, who were not listed on the indictment, were called as witnesses at trial. However, counsel testified that he had received the officers' names from the prosecutor as a part of the discovery materials he requested, and had been made aware that they would be called as witnesses.

On cross-examination, trial counsel acknowledged that he did not question any witnesses at trial as to how a gun could be found upright in the front seat where the other suspect had been sitting.

Counsel stated that he did not believe it was inconsistent for the petitioner's gun to be found sitting upright in the passenger seat which had been occupied by the other suspect. Counsel also acknowledged that he may have gotten Officer Crawford and Officer Booher's names from either the prosecutor or from petitioner's prior assigned counsel. Counsel admitted that he was reluctant to raise the issue of Officer Beyer's suicide because he knew that he had nothing to support an inference that the suicide was related to the petitioner's case. Counsel stated that police officers were unable to find the other suspect.

After the evidentiary hearing, the post-conviction court denied the petition by written order entered February 11, 2008. The petitioner filed a timely notice of appeal.

II. ANALYSIS

On appeal, the petitioner argues that he received the ineffective assistance of counsel at trial. Specifically, the petitioner argues that trial counsel was ineffective for failing to: (1) raise the issue of evidence planted by police; (2) object to the testimony of Officers Booher and Crawford; (3) raise the circumstances surrounding Officer Craig Beyer's suicide; (4) address the inconsistency created by the location of the gun in the passenger seat; (5) investigate the fact that there was no alley behind Buckner street; (6) show the petitioner a copy of the surveillance videotape from his pursuit; (7) offer any evidence that the petitioner was in the store prior to the robbery to check prices and item availability and not for the purpose of "casing" the store; (8) address the issue of how unlikely the escape route taken by the petitioner would have been if he had actually participated in robbery; and (9) urge the Court of Criminal Appeals to create a special rule excluding Officer Craig Beyer's preliminary hearing testimony at trial because Officer Beyer had committed suicide.

In order for a petitioner to succeed on a post-conviction claim, he must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). A post-conviction court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that

every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Once the petitioner proves that counsel's representation fell below a reasonable standard, the petitioner must also prove prejudice. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id.* at 697. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* In considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronin*, 466 U.S. 648, 665 n. 38 (1984).

In its written order, the post-conviction court found that the petitioner received the effective assistance of counsel. Addressing the petitioner's complaints in great detail, the court stated:

The Petitioner testified at his post-conviction hearing as to several complaints about the performance of trial counsel:

(a) Trial counsel failed to raise the issue that the bag containing a gun, gloves and ski mask allegedly used by an unidentified accomplice in the robbery and found in Petitioner's vehicle after a stop had been planted by law enforcement. It is clear from the post-conviction testimony that keeping out these seized items was crucial to the defense. However, the motion to suppress was denied by the trial court after hearings on December 3 and 10, 2004. Even after the motion to suppress was denied, Petitioner still desired that a defense be raised at trial that . . . the evidence was planted by law enforcement. However, trial counsel stated at the post-conviction hearing that without any evidence to back up an allegation that the seized items were planted, it was difficult to overcome the testimony of the three police officers who found the evidence. The Court accredits trial counsel's testimony and evaluation of the facts and finds that the failure of trial counsel to raise the issue of planted evidence at trial, without any substantiating evidence to back up the allegation, is not a deficiency in the performance of trial counsel. The law requires that an attorney at trial must have a good faith basis to raise an issue such as planted evidence. Further, failure to challenge three officers about their testimony of finding the evidence could also be considered trial strategy on the part of trial counsel.

(b) Trial counsel failed to object at trial to the testimony of Officers Allen Booher and Steve Crawford whose names did not appear on the Indictment. While the names of Officers Booher and Crawford do not appear in the form discovery

response as potential State witnesses, it is clear from the testimony that trial counsel knew that these officers could potentially testify at trial. Further, Officer Crawford testified at the suppression hearing before trial. The Court accredits the testimony of trial counsel and finds that trial counsel was aware prior to trial that these two witnesses might testify at trial and trial counsel's failure to object to these officers' testimony is not a deficiency in the performance of trial counsel.

(c) Trial counsel failed to raise at trial the circumstances of the death of Officer Craig Beyer who had committed suicide prior to trial. The Petitioner alleges that the death of Officer Beyer by suicide could have been related to Petitioner's claim that the evidence was planted in the vehicle. While the jury only initially heard that Officer Beyer had died prior to trial, trial counsel was able to introduce into evidence the fact that Officer Beyer had committed suicide. The Petitioner wanted the suicide issue to be raised to show somehow that Officer Beyer's suicide was related to the prosecution of Petitioner's case, including Petitioner's assertion that the evidence was planted. However, trial counsel investigated the allegation that the suicide was related to Officer Beyer's work as a police officer and found nothing to substantiate the claim. Further, trial counsel had no evidence to raise an issue that the death of Officer Beyer was related to the charge against Petitioner. The Court accredits the testimony of trial counsel as to the fact that there was no basis to raise the issue at trial. Failure of trial counsel to raise this issue is not a deficiency on the part of trial counsel as trial counsel did not have a good faith bas[is] to argue the allegation.

(d) Trial counsel failed to raise at trial, as part of the issue of planted evidence, the fact that the gun was found sitting straight up and down in the bag in the seat and that the gun had not been tossed from the vehicle. Trial counsel testified that the gun being found upright was not a factor that he had ever contemplated to bring out at trial. Further, in trial counsel's opinion, it was very possible for the gun to have been left in an upright position. Also, it was trial counsel's contention that raising the issue that if the Petitioner had been smarter he would have disposed of the weapon before Petitioner was seized by the pursuing police officers. Trial counsel's failure to raise the issue is not deficiency on the part of trial counsel, nor did the failure to raise the issue result in prejudice to the Petitioner that deprived him of a fair trial.

(e) Trial counsel failed to raise at trial the fact that there was not an alleyway at Buckner Street where the unidentified codefendant is alleged to have left Petitioner's vehicle. While the issue may not have been raised at trial, the failure to raise the issue was not a deficiency on the part of the trial counsel. Even if the failure to raise the issue could be considered as a deficiency on the part of trial counsel, in light of the "significant circumstantial evidence" (*See State v. Michael James Grubb*, Ct. Crim. App. E2005-01555-CCA-R3-CD, p. 10) in this case, failure to raise the issue did not deprive the Petitioner of a fair trial.

(f) Trial counsel failed to show the pursuit video to Petitioner prior to trial. Even though Petitioner alleges that he did not review the pursuit video prior to trial, trial counsel testified that he and Petitioner reviewed the tape prior to trial. The Petitioner acknowledged that he did see the video at the suppression hearing held prior to trial. Further, trial counsel testified that it was Petitioner that noticed a discrepancy in the timing on the tape, and trial counsel cross-examined one of the officers extensively about the discrepancy. Since Petitioner saw the video prior to trial, relief on this issue is denied.

(g) Trial counsel failed to offer at trial any evidence that Petitioner was at the store where the aggravated robbery occurred for the purpose of checking prices and not for the purpose of “casing” the store prior to the crime. The Petitioner says he left the question of whether to raise this issue to trial counsel for a decision. The Petitioner acknowledged that trial counsel asked the clerk from the store about the advertisement that Petitioner says prompted him to go to the store, but the clerk did not remember the advertisement. Further, Petitioner also acknowledged that he elected not to testify in the jury trial. The Court finds that trial counsel raised the issue, but without additional evidence to offer, could not develop the issue further. Relief on this issue is denied.

(h) Trial counsel failed to develop fully the issue of how unlikely the Petitioner’s route would have been if [he] had participated in the aggravated robbery. At the post-conviction hearing[,] Petitioner acknowledged that trial counsel did mention the indirect nature of the route, but did not show the jury any visual evidence. Petitioner has failed to demonstrate how trial counsel’s performance on this issue was deficient or how the Petitioner was deprived of his right to a fair trial. Relief on this issue is denied.

. . . .

Trial counsel was deficient because he failed to urge the Court of Criminal Appeals to create a special rule that would have denied the introduction into evidence preliminary hearing testimony under the unavailable witness hearsay exception if the unavailable witness was a police officer who had committed suicide. On appeal, the Court of Criminal Appeals ruled it was proper under the rules of evidence for the preliminary hearing transcript of Officer Craig Beyer to be admitted into evidence. (*State v. Michael James Grubb*, p. 7-8). Post-conviction counsel suggests that trial counsel, on appeal, should have urged the Court of Criminal Appeals to create a special exception for the unavailable witness rule if the police officer witness committed suicide. The failure of trial counsel to raise an issue on appeal to change an area of settled law is not a deficiency. Relief on this issue is denied

Like the post-conviction court, we conclude there is no merit to the petitioner's allegation that he received the ineffective assistance of counsel. The record in this case fully supports the post-conviction court's findings that counsel provided effective representation. Counsel's testimony, which was specifically accredited by the post-conviction court, established that he spoke with the petitioner on different occasions, discussed the issues raised by the petitioner, investigated the facts of the case, including the circumstances surrounding Officer Beyer's suicide, and competently presented the case at trial. In sum, we agree with the post-conviction court that there is no evidence that counsel was deficient in his representation, or that the petitioner suffered any prejudice as a result of any alleged deficiencies of counsel. *See Strickland*, 466 U.S. at 687; *see also Arnold*, 143 S.W.3d at 787. In addition, we also conclude that trial counsel's representation of petitioner was not deficient because he chose not to challenge settled law regarding Officer Beyer's unavailability and the use of his preliminary hearing testimony. Because the record does not preponderate against the post-conviction court's findings, the petitioner is not entitled to post-conviction relief.

CONCLUSION

Following our review, we conclude that petitioner received the effective assistance of counsel at trial. Accordingly, we affirm the denial of the petition for post-conviction relief.

J.C. McLIN, JUDGE